THE RECORD
OF THE ASSOCIATION OF THE BAR OF THE CITY OF NEW YORK

EDITORIAL BOARD

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Association Activities

ON APRIL 18, 1906, the law library of the San Francisco Bar Association was destroyed by earthquake and fire. On May 4, 1906, at a special meeting of the Executive Committee of the Association of the Bar a committee was designated to consider "the present need of books by the courts and counsel in San Francisco, and to render aid to the counsel and courts in procuring books to supply the needs created by the recent disaster to that city." This committee, after correspondence with the San Francisco Bar Association, determined that the most useful assistance would be the procuring and presentation of a set of the reports, session laws and statute laws of New York, together with text books and digests. In June 1,374 volumes were sent to San Francisco by the Wells Fargo & Company Express, which carried them free of charge. On July 13 the San Francisco Bar Association adopted the following resolution:

WHEREAS, The Association of the Bar of the City of New York, prompted by the highest motives of professional comradeship, by way of assisting in restoring the Library of this Association destroyed in the great fire of April, 1906, has purchased and caused to be sent to this Association, free of cost,

a substantially complete set of New York books, reports, statutes, etc., comprising about fourteen hundred volumes;

Now, therefore, be it

RESOLVED, that this Association does hereby gratefully accept the donation so made; that all of said books be kept as a perpetual memorial and recognition of the kindly feeling and sympathy so substantially manifested by The Association of the Bar of the City of New York; that a book plate be specially devised, a copy of which shall be placed in each one of said books.

RESOLVED, FURTHER, that a certified copy of this preamble and of these resolutions be transmitted by our Secretary to the President of The Association of the Bar of the City of New York.

On April 18 of this year The Bar Association of San Francisco organized a luncheon to commemorate the fifty-second anniversary of the earthquake and fire and had as guests of honor over 40 lawyers who were practicing on April 6, 1906 and are still actively engaged in the practice of law. The President of the Association was invited as a special guest at the luncheon and was presented with a sizeable number of California books for the Association's library and a San Francisco Giants cap for himself. Appropriate recognition of these gifts will be made at the Annual Meeting of the Association on May 13.

AT THE February meeting of the Committee on Municipal Affairs, Joseph D. McGoldrick, Chairman, Professor Hans Zeisel of the University of Chicago discussed with the Committee the jury study being conducted by the University.

PRELIMINARY RESULTS of a survey on pre-trial procedures in the Supreme Court conducted by the Committee on Courts of Superior Jurisdiction, John F. Dooling, Jr., Chairman, indicate that pre-trial sessions are attended by lawyers with authority to act; in New York County pre-trials are conducted by a justice of the Court, whereas in the Bronx judges do not preside over most pre-trial hearings; discussions relative to limitation of issues or admissions do not take place at the pre-trial sessions; one to

three hours is about the normal time lawyers spend in waiting to be heard at pre-trial hearings, whereas the average time consumed by the hearings has been about ten minutes. The Committee will continue its survey.

ON APRIL 23RD the Committee on Criminal Courts, Law and Procedure held a reception for the Justices of the Court of Special Sessions and the City Magistrates. Mayor Wagner spoke briefly as did the Chief Justice of the Court of Special Sessions and the Chief City Magistrate. The guests were welcomed by the President of the Association and the Chairman of the Criminal Courts Committee, Sol Gelb.

THE ASSOCIATION has been presented with portraits of three former Presidents: Bethuel M. Webster by Sidney E. Dickinson, Allen T. Klots by Trafford Klots and a portrait bust of Harrison Tweed by Eleanor Platt. The three portraits were unveiled at an informal meeting on April 14th. The portraits are gifts to the Association by the partners of the three former Presidents.

AT ITS March meeting the Committee on Real Property Law, Benjamin Pollack, Chairman, had as its guest George I. Gross, who discussed insurance problems affecting lawyers and tenants, and mortgagees and mortgagors.

EDWIN F. CHINLUND, Chairman of the Committee for Modern Courts, issued the following statement after the defeat in the Assembly of the court reorganization bill:

"The action of the Assembly last Tuesday on the Senate-approved court reorganization bill was a shocking betrayal of the public interest. The flagrant disregard of widespread demand for court modernization was a victory for the vested political and judicial interests that want things to remain unchanged. It is a dramatic demonstration of behind-the-scenes

influence which has hampered the administration of justice in New York for many years.

"The bold indifference in the Assembly to public opinion and the public interest was heightened by the cynical argument that certain responsible groups had opposed the plan. This is blatant hypocrisy. The honest opposition of these groups was because they wanted MORE and not NO improvement.

"When the Assembly on its final day, after the Senate had voted continuance, quietly extinguished the future life of the Tweed Commission, it completed its arrogant defiance of the public.

"On December 20, 1957, we mailed a letter to all members of the Legislature to their office or home reminding them of the responsibility of the Legislature at this session to take early action and not allow court reorganization to drag until the last, hectic days of the session.

"The speeches made in both the Senate and the Assembly indicate clearly that the legislators have forgotten that their responsibility is to legislate. The Judiciary Committees of the Senate and Assembly held a joint hearing on February 18 in which the Judicial Conference, many other judges and numerous organizations testified urging court reorganization. Several organizations testified for court reorganization, but for a stronger bill than the bill under consideration.

"The Judiciary Committees of the Senate and Assembly did nothing following the hearing, whereas they should have taken the responsibility for reporting out a bill for court reorganization. Since this was not done, the Legislature abdicated its responsibility to legislate.

"The Assembly has left New York in the forefront of the undeveloped states with its 110-year old "hodge podge" court system. The Committee for Modern Courts with many other organizations and many thousands of indignant citizens will continue the fight to get New York out of this distasteful category.

"It is also apparent that the intra-Republican party dispute, which affected other legislation, was undoubtedly a factor in the defeat of court reorganization. The failure to exert leadership by the Governor and the Democratic leaders was another important factor in the defeat of court reorganization.

"The Committee for Modern Courts will now work out its plans for court reorganization in the 1959 session of the Legislature and its program for cooperation with all other organizations working for court reorganization, so as to get unanimous agreement on the form and wording of the necessary constitutional amendment.

"Let no one think that court reform is dead. A battle has been lost, but the fight will be continued with vigor and confidence in its ultimate successful outcome."

On April 4th Harrison Tweed, formerly Chairman of the Temporary Commission on the Courts, released the following state-

ment on the action of the Legislature in relation to the work of the Commission:

"The Temporary Commission on the Courts, created by the Legislature in 1953, ceased to exist at midnight last Monday, March 31, by reason of the failure of the Assembly to pass the bill, which had already passed the Senate, to extend the life of the Commission for another year. Logically the Commission could hardly have expected to be continued for purposes of recommending court reorganization after the defeat in the Assembly on March 25 of the Concurrent Resolution of March 17, which constituted a somewhat revised version of the Commission's plan contained in its statement of January 6, 1958 and the Hughes-Kapelman Concurrent Resolution of February 3, 1958.

"This action of the Assembly imperilled another responsibility of the Commission. This was to recommend a revision of Practice and Procedure. The work had been more than half done and had already cost $100,000 of the people's money. The action of the Assembly terminated on six days' notice the salaries of the lawyers engaged in this work as well as the salaries of the other lawyers and employees on the payroll of the Commission.

"I want to add a few details which may be of interest to the public.

"The Hughes-Kapelman Concurrent Resolution of February 3, 1958 was the result of more than three years' study and preparation by the Commission. It never came out of Committee. Its introduction ended the responsibility of the Commission in this area. The matter of court reorganization then became the responsibility of the Legislature.

"The Commission believed that it was appropriate and proper, if not essential, that its proposal should receive bipartisan support. It tried very hard to bring this about. It repeatedly urged the Republican leaders to seek agreement with Governor Harriman and the Democratic legislative leaders but, so far as I know, this never came about or, for that matter, was ever attempted by anyone.

"In the opinion of the Commission it would have been contrary to the intent of the Legislature in creating it and specifying its duties for it to go further than this and to do any lobbying in the sense of seeking the support of individual members of the Senate or Assembly or to engage in public propaganda of any sort. Accordingly, it did neither of these things. However, it offered to Governor Harriman, the legislative leaders on both sides of the aisle and the Chairman of the Assembly Judiciary Committee to answer questions and give information whenever requested.

"What the Republican leaders did was to revise the Commission's Resolution twice. The second revision of March 17 was the one passed by the Senate on March 21 and defeated in the Assembly on March 25. This revision made some changes in draftsmanship and three changes in substance whereby the Surrogates' Courts in New York City and the six largest counties outside of it and the Court of Claims were continued as independent courts and Queens County was continued as a part of the Tenth District

with a special provision for the election of four Supreme Court judges on a county vote. None of these changes were approved by the Commission.

"Going back to the beginning of the session, Governor Harriman and Judge Gutman, his Counsel, had assured the Commission of their support of the general principle of court reorganization but, as things developed and time went by, even their lip service diminished and if it be the fact that the Governor was on the side of court reorganization his leadership and influence with his party would seem to be very feeble.

"The legislative Democratic leaders, Senator Zaretski and Assemblyman Bannigan, were at no time willing to discuss either the real or the political merits of the reorganization plans further than to express dissatisfaction with the attitude of the Commission in not being more insistent that Queens County be made a separate Judicial District, to suggest that the Surrogates' Courts in New York City should remain independent courts and to imply a lack of enthusiasm for administrative supervision of the courts.

"Secretary of State, Carmine DeSapio, was even more elusive than the legislative leaders and in four meetings, secured with difficulty, contributed nothing more than to say that Governor Harriman favored action and that he would see me again. The Democratic legislative members of the Commission, Senator Rosenblatt and Assemblyman Kapelman, even before the Session opened, admittedly merely awaited and finally blindly obeyed orders.

"On the Republican side, Chief Counsel Lynch and I talked frequently with Senator Mahoney, Speaker Heck and Majority Leader Carlino, among others. Senator John H. Hughes of the Commission stood up for the Commission's recommendations from first to last and spoke forcefully on the floor of the Senate on a number of occasions. He was also persistent and aggressive in his attempts to persuade the leaders to give the Commission speedier and stronger support. The Republican Assemblyman on the Commission, Robert Walmsley, although not so aggressive, did all he could to secure favorable action in the Assembly.

"That Senator Mahoney, as Majority Leader of the Senate, gave his best to the cause of court reorganization is evidenced by the fact that 29 of the 36 Republican Senators present voted in favor of the Concurrent Resolution. It is also true, however, that this was not a labor of love. No one in the Legislature loved reorganization of the courts.

"Another loyal supporter, and I think the nearest to a lover of the Commission's recommendations, was Assembly Majority Leader Joseph Carlino. He, personally, gave careful, critical and constructive study to the various plans and was always ready and willing and often anxious to discuss with Mr. Lynch and me questions of detail and procedure. His counsel, Ralph Edsell, attended almost every meeting of the Commission and combined they did all that lay within their power.

"Speaker Oswald Heck was less accessible and communicative. There are those who think that he was not personally strongly in favor of court reorganization. Others insist that he did all that he could to secure passage of the Resolution in the Assembly. My own view is that the Speaker could

have secured its passage if he had wanted to go all out in the effort, as he did, for instance, in opposing the one year residence requirement for unemployment relief. But that he did not do.

"Shortly before the Concurrent Resolution came up on the floor of the Senate on March 21, it was generally known that Senator Mahoney had enough Republican votes to pass it. The actual vote was 29 Republicans and 19 Democrats in favor, 7 Republicans and 2 Democrats opposed. When the Concurrent Resolution came on the floor of the Assembly on March 25, it was generally known that not enough Republicans were in favor of it to insure passage. In fact, only 50 of the 93 Republican Assemblymen present voted for it and the Democrat Assemblymen voted to a man—all 51 of them—against it.

"On the floor of the Senate, Senator Zaretski, the Minority Leader, derided the Resolution on the ground that it would not effect a sufficiently thorough reorganization of the courts. He spoke strongly against the Resolution, but he and 18 other Democratic Senators voted in favor of it. In my view, his statement was the rankest kind of hypocrisy, since I am certain that the Democrats wanted no form of court reorganization at all, let alone a more drastic one, and only voted in favor because its passage by the Republicans was virtually certain.

"On the floor of the Assembly, Mr. Bannigan, the Minority Leader, also spoke against the Resolution along somewhat the same lines as Senator Zaretzki had taken in the Senate. Since Democratic votes in the Assembly could defeat the Resolution, all of the Democrats voted against it whereas the affirmative vote of a bare majority of them would have assured its passage. In my view, the action of the Democratic Assemblymen evidenced the true feelings of all the Democrats in the Legislature—they were against court reorganization from start to finish and in any form.

"I think I can fairly summarize the alignment of forces. First of all, the public generally demands court reorganization and administration. The proof of it is to be found in the editorial attitude of the press throughout the State, which follows, as much as it leads, public opinion; in the organization and financing of such groups as The Committee for Modern Courts, Inc., under the leadership of Edwin F. Chinlund; and in the support of other lay organizations. The leaders in this demand are those in public positions and among the judiciary who have taken an objective point of view of the need for court reorganization. They include such men as Chief Judge Conway of the Court of Appeals, present and past Presiding Justices of the four Appellate Divisions—Justices Botein, Peck, Nolan, Foster and McCurn—Mayor Wagner of the City of New York, former Chief Judge of the Court of Appeals Lewis, and Supreme Court Justice Noonan of Buffalo. They are all men whose positions and experience have brought home to them the facts of the present situation in every part of the State and the need for improvement.

"Similarly, among the lay groups which have demanded court reorganization are those vitally interested and directly concerned in improving the judicial handling of the problems of children and the family. Among

the professional groups some, but by no means all, of the bar associations gave their support. Finally, among the lawyers a few—but very few—raised their voices.

"Aligned in opposition, and in the forefront of it, were most of the Supreme Court Justices and the Surrogates, and many of the County Judges, particularly those taking lucrative advantage of the right to practice law on the side. The opposition of these judges was irrespective of party affiliation or geographical location. In my opinion, their opposition was based entirely on self-interest. They wish no change in the present state of affairs and particularly they wish no supervision of themselves or their personnel in the conduct of their court business.

"A somewhat similar opposition came from the politicians and was, of course, inspired by the same self-interest. It is a truism that the relationship between judges and politicians is very close and that their combined influence in the Legislature is very great.

"Another truism, that politics makes strange bedfellows, is pertinent. For we find the League of Women Voters and a few others aligned with the judges and the politicians in their opposition to the proposals for court reorganization advanced in the Legislature—although on different grounds. The League opposes because it seeks something nearer perfection than the proposals of the legislative leaders or the Commission regardless of how long it takes. No opposition on the merits appeared from any source.

"The 1958 Legislature killed the proposal for reorganization and administration of the courts and thus deprived the public of an opportunity to express its opinion at the polls. It brought the Temporary Commission on the Courts to an end. But the cause of court reform is not dead. The public will neither forget nor forgive. It will hold accountable both major political parties and their representatives in the Legislature. But, if the objective is to be secured, the public must be willing to give more in thought and effort and to so organize that its influence will overcome the skilled and subtle influence of judges and other politicians.

"I enlist in any such campaign. And I hope that lawyers generally will do likewise, so that this great opportunity which the Bar has to serve the public will not be lost through a lack of initiative and courage."

A FORUM on "The Social Worker in Court" was sponsored by the Committee on the Domestic Relations Court, Jacob L. Isaacs, Chairman. Speakers were: Jacob D. Hyman, Dean, University of Buffalo School of Law, Russell G. Oswald, Commissioner, Board of Parole, State of New York, formerly Director of Correction, Massachusetts and Wisconsin, Timothy N. Pfeiffer, former President, Legal Aid Society of New York and Herbert Wechsler, Professor of Law, Columbia University School of

Law. Discussion leaders were Jane M. Hoey, President, Council on Social Work Program and Howard Hilton Spellman. Chairman of the sub-committee in charge of the forum was Mary Conway Kohler.

"THE LAWYERS Most Neglected Client—Himself" was the subject of a discussion organized by the Committee on Insurance Law, Robert H. Kilroe, Chairman. The discussion centered on the place of insurance in life and estate planning for the individual practitioner, the partner and corporate counsel. Harry J. McCallion was the moderator and Carbery O'Shea, Martin M. Lore and Edwin M. Jones led the discussion.

PROFESSOR WOLFGANG FRIEDMANN of the Columbia University Law School was the guest of the Section on Jurisprudence and Comparative Law, The Honorable Samuel C. Coleman, Chairman. Professor Friedmann spoke on "Some Observations on 'Principles of Law Common to the Parties,' in the Interpretation of Recent International Treaties." Emphasis was placed on the significance of this phrase in treaties (Iranian Oil Consortium, Euratom, *e.g.*) and of the contribution of comparative jurisprudence toward the solution of some of the problems arising from the introduction of the phrase,—such as disputes over foreign concessions.

NORTHWESTERN UNIVERSITY School of Law will sponsor two short courses for defense lawyers and prosecuting attorneys. The course for defense lawyers will be held from August 11 to 16; that for prosecuting attorneys from August 4 to 9. The attendance fee for each course is $100. A copy of the complete program for the course will be available on June 1 upon application to Professor Fred E. Inbau, Northwestern University School of Law, Lake Shore Drive and Chicago Avenue, Chicago 11.

The Calendar of the Association for May and June

(as of April 30, 1958)

May 1 *13th Annual Art Exhibition*—Opens 4:30 P.M.

May 5 Dinner Meeting of Committee on Professional Ethics
Dinner Meeting of Committee on Federal Legislation

May 6 Dinner Meeting of Special Committee on Rent Control Laws

May 7 Dinner Meeting of Executive Committee
Meeting of Section on Wills, Trusts and Estates

May 8 *Symposium: "Narcotics, the Law and the Physician (A New Policy Toward Narcotics Addiction?)* Sponsored by Committee on Medical Jurisprudence, the New York Academy of Medicine and the Society on Medical Jurisprudence

May 12 Dinner Meeting of Committee on International Law

May 13 *Annual Meeting of Association—8:00 P.M., Buffet Supper 6:15 P.M.*

May 14 Dinner Meeting of Committee on Trade Marks and Unfair Competition
Dinner Meeting of Committee on Domestic Relations Courts
Dinner Meeting of Committee on Legal Aid

May 15 Dinner Meeting of Committee on the Bill of Rights
Meeting of Section on Banking, Corporation and Business Law
Dinner Meeting of Committee on Administrative Law

May 16 *The Association Ball*—Sponsorship Entertainment Committee

May 19 Meeting of Library Committee
Joint Meeting of Committee on Atomic Energy and Section on Corporate Law Departments

May 20 Meeting of Section on Jurisprudence and Comparative Law
Dinner Meeting of Committee on Foreign Law

May 21 Meeting of Committee on Admissions

May 22 Dinner Meeting of Committee on Aeronautics

May 27 Symposium: Sponsored by Committee on Arbitration

May 28 *17th Annual Benjamin N. Cardozo Lecture.* "The Functions and Responsibilities of an Advocate" Speaker—The Right Honourable Sir Hartley William Shawcross, P.C., Q.C., Former Attorney General of Great Britain, 8:00 P.M. *Buffet Supper, 7:15 P.M.*

June 2 Dinner Meeting of Committee on Professional Ethics

June 3 Dinner Meeting of Committee on International Law

June 4 Meeting of Section on Trade Regulation

June 10 Dinner Meeting of Committee on Foreign Law

June 11 Dinner Meeting of Committee on Federal Legislation

June 18 Meeting of Committee on Admissions
Dinner Meeting of Executive Committee

SEC Litigation – Before the Commission and the Courts

By WILLIAM H. TIMBERS

Tonight I should like briefly to discuss with you (A) the types of administrative proceedings before the SEC in which the general practitioner is most likely to be retained; (B) a clinical diagnosis of a typical SEC administrative proceeding; and (C) a proposed Decalogue for the general practitioner before the SEC. While the emphasis will be upon the administrative proceedings before the Commission, each step in such administrative proceedings must be considered with a view to possible recourse to the Courts either by way of appeal or enforcement proceedings.

A

TYPES OF SEC ADMINISTRATIVE PROCEEDINGS

1. *Stop-Order Proceedings*

Stop-order proceedings may be instituted by the Commission[1] to suspend at any time the effectiveness of a registration statement if it "includes any untrue statement of a material fact or omits to state any material fact required to be stated therein or necessary to make the statements therein not misleading."

The current importance of the stop-order proceedings can readily be seen: prior to 1954 the Commission had issued no stop-orders for a period of about twelve years;[2] in 1955 it instituted three stop-order proceedings;[3] in 1956 it instituted eight stop-order proceedings and issued three stop-orders;[4] in 1957 it

Editor's Note: Mr. Timbers delivered this lecture before the Section on Litigation of which Edward C. McLean is the Chairman. Mr. Timbers is a member of the Connecticut, New York and District of Columbia Bars and is a former General Counsel of the Securities and Exchange Commission.

1 Pursuant to Section 8(d) of the Securities Act of 1933.

2 Testimony of SEC Chairman Armstrong before House Committee on Interstate and Foreign Commerce, "Agency Hearings," 85th Cong. 1st Sess. (1957), p. 78.

3 S.E.C. 21st Annual Report, p. 14.

4 S.E.C. 22nd Annual Report, p. 71.

instituted ten stop-order proceedings and issued eight stop-orders.[5]

The purpose of the stop-order proceeding is to put into an evidentiary hearing any registration statement which on its face appears to be either fraudulent or so carelessly prepared as not to be susceptible of correction in accordance with the Staff's typical deficiency letter or letter of comment.[6]

Normally the Division of Corporation Finance is primarily responsible for the initiation and conduct of stop-order proceedings and investigations preliminary thereto. Once the stop-order proceeding is commenced, one of the Division's section attorneys or an attorney on the staff of the Division's Chief Counsel usually is in charge of the case. When a stop-order hearing is held at some place distant from Washington, D.C., a lawyer on the staff of the local regional office usually represents the Division or assists in the presentation of the Division's case.

In the majority of stop-order proceedings the registrant does not vigorously dispute the Division's allegations and often concedes the deficiencies by filing appropriate amendments during the course of the hearing.[7]

An interesting question of long standing related to stop-order proceedings is whether a registrant may as a matter of right withdraw a registration statement prior to its effectiveness. In the early case of *Jones* v. *S.E.C.*,[8] the Supreme Court held that a registrant as a matter of right could withdraw a registration statement prior to its effective date. Although this decision has been whittled away to some extent by the lower courts in the intervening years,

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[5] S.E.C. 23rd Annual Report, p. 41.

[6] Upon the question whether under Section 9(b) of the Administrative Procedure Act a registrant is entitled as a matter of right to notice of deficiencies and an opportunity to correct them before stop-order proceedings are instituted, see *In the Matter of Universal Service Corporation, Inc.*, 36 S.E.C. 595 (1955).

[7] In a decision rendered after this Address was given, the Commission held that a registrant does not have an absolute right to withdraw a registration statement prior to its effective date and that a registration statement is not superseded by an amendment filed after institution of stop-order proceedings. *In the Matter of Columbia General Investment Corporation*, Securities Act Release No. 3901 (March 5, 1958).

[8] 298 U.S. 1 (1936).

it has never been overruled by the Supreme Court; nor has the question, so far as I know, been presented to the Supreme Court, by certiorari or otherwise, subsequent to the *Jones* case.[9]

At various sessions of Congress, particularly in recent years, the Commission has proposed legislation which would amend Section 6(c) of the Securities Act of 1933 to make it clear that a registration statement filed under that Act may be withdrawn only by consent of the Commission pursuant to Rule 477.[10] Congress, however, has not enacted such legislation up to the present time.

The question of the right of a registrant to withdraw its registration statement prior to the effective date was recently passed on by the Commission in a 4–1 decision in *In Matter of Comico Corporation*.[11] There the registrant applied for permission to withdraw its registration statement after an investigation by the Division but prior to the effective date and before stop-order proceedings were instituted. The registrant contended that under the *Jones* case it had an absolute right to withdraw its registration statement. The Commission, however, refused to allow withdrawal of the registration statement on the ground that the registrant's affiliate had public stockholders and had an option to acquire a substantial amount of the registrant's outstanding stock from officers of the registrant who also were officers of the affiliate. Commissioner Sargent filed a dissenting opinion in which he expressed the view that under the *Jones* case the registrant had an absolute right to withdraw its registration statement and he could not find a reasonable or material basis for distinguishing the facts of the *Comico* case from those of the *Jones* case.[12]

2. *Regulation A Suspension Proceedings*

The initial processing of applications for Regulation A exemptions is now handled by the regional offices. Any recommenda-

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9 *Cf. Resources Corporation International* v. *S.E.C.*, 103 F. 2d 929 (C.A.D.C., 1939); *Oklahoma-Texas Trust* v. *S.E.C.*, 100 F. 2d 888 (C.A. 10th, 1939).

10 See, S.E.C. 22nd Annual Report, p. 8; S.E.C. 23rd Annual Report, p. 11.

11 Securities Act Release No. 3863 (December 17, 1957).

12 *Cf. In the Matter of Columbia General Investment Corporation*, Securities Act Release No. 3901 (March 5, 1958); *In the Matter of Lewisohn Copper Corp.*, Securities Act Release No. 3907 (March 18, 1958).

tion for a suspension order under Regulation A is referred to the Division of Corporation Finance in Washington by the regional office.

In the event the Commission issues an order temporarily suspending a Regulation A exemption, that order usually provides for an opportunity for hearing upon request of the registrant on the question of whether the suspension order should be vacated or made permanent.

Hearings on such suspension orders under Regulation A usually are conducted at the regional offices with the regional office staff in charge of the presentation of the Division's case.

3. *Enforcement Proceedings Against Broker-Dealers*

Proceedings involving broker-dealers are authorized by the Securities Exchange Act of 1934.[13] If the person or company involved is registered as a broker-dealer with the SEC, the Division's enforcement proceeding may seek revocation or suspension of the registration; if the broker-dealer is applying for registration, the proceeding may be one to determine whether the application should be granted or denied.

Typical issues which arise in broker-dealer enforcement proceedings include (i) fraud in the purchase and sale of securities, (ii) selling unregistered securities, (iii) filing of false, misleading or uncertified financial reports, and (iv) failure to comply with the Commission's requirements with respect to maintenance of records and the Commission's net capital requirements.[14]

The Commission also reviews disciplinary action taken by the National Association of Securities Dealers against its members.[15]

4. *Investment Company Act Proceedings*

Concomitant with the phenomenal growth of investment companies and mutual funds in recent years, there has been a sharp

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[13] Section 15(b).

[14] For a recent decision involving Rule X-15C3-1, the Commission's net capital rule, see *S.E.C.* v. *Peerless-New York, Inc.*, 157 F. Supp. 328 (S.D.N.Y. 1958).

[15] Section 15A(g) of the Act provides that disciplinary actions by the N.A.S.D. are subject to review by the Commission on its own motion or on the application of any aggrieved party.

increase in administrative proceedings before the SEC under the Investment Company Act of 1940.

Proceedings under this statute encompass a wide variety of issues, among which the following arise most frequently:

a. Applications pursuant to Section 17(b) for exemption from the provisions of Section 17(a), the latter section prohibiting certain transactions between affiliates.[16] The term "affiliated person" as defined by Section 2(a)(3) of the Act has far-reaching scope.

b. Applications pursuant to Section 6(c) or Section 3(b)(2), or under both sections, to determine whether a company is an "investment company" as defined by the Act.[17]

c. Applications pursuant to Section 8(f) for a declaration that a company is not, or has ceased to be, an investment company as defined by the Act.[18]

d. Applications pursuant to Section 10(f) exempting a company from the interdictions of that section regarding the purchase of securities during the existence of an underwriting syndicate.[19]

The Investment Company Act requires that an opportunity to be heard shall be granted before any order is entered under the Act.[20] Administrative hearings are not actually held on all applications under the Act since hearings often are not sought; in fact the bulk of such applications are disposed of without hearing.

The Commission's Rule N-5 under the Investment Company

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16 See, *e.g. In the Matter of Pennsylvania Bankshares & Securities Corporation,* Investment Company Act Release No. 2637 (December 4, 1957).

17 See, *e.g. In the Matter of Hercules Tankers, Inc.,* Investment Company Act Release No. 2604 (September 26, 1957); *In the Matter of First Mississippi Corporation,* Investment Company Act Release No. 2619 (October 25, 1957).

18 See, *e.g. In the Matter of Capital and Management, Inc.,* Investment Company Act Release No. 2587 (August 28, 1957).

19 See, *e.g. In the Matter of Pine Street Fund, Inc.,* Investment Company Act Release No. 2649 (January 6, 1958).

20 Section 40(a).

Act permits a simplified procedure to expedite disposition of many proceedings initiated under this Act. By use of the N-5 form of notice in appropriate cases,[21] the Commission gives notice to all interested persons of the filing of the application. Such notice is sent to the registrant and to those on the Commission's mailing list; and it is published in the Federal Register. A typical N-5 form of notice summarizes the application which has been filed, states the statutory authority for the relief sought, sets forth the issues raised by the application and directs interested persons to file a request for hearing, usually within 15 days of the date of the notice. If no request for a hearing has been filed within the prescribed time, the Commission usually grants the application as a matter of course, although it may order a hearing on its own motion. Even if a hearing is requested within the prescribed time, the Commission still may grant the application without a hearing if it is satisfied that no useful purpose would be served by such a hearing and that the order may be entered with full protection to investors and the public.

5. *Holding Company Act Proceedings*

A discussion of administrative proceedings before the SEC under the Holding Company Act could well occupy a full evening. I therefore shall pass this area, noting only that the reorganization proceedings under Section 11(e) of the Holding Company Act have been almost entirely concluded, with the exception of the important matter of fee applications, many of which are still pending before the Commission and the Courts.

Proceedings involving the regulation of registered holding companies of course occupy the attention of the bulk of the Staff of the Division of Corporate Regulation.

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21 Rule N-5 recently has been amended by way of clarification. Investment Company Act Release No. 2620 (October 25, 1957). For an expression of the Commission's view concerning Rule N-5, prior to its recent amendment, see, *In the Matter of Portsmouth Steel Corporation,* Investment Company Act Release No. 1890 (July 30, 1953). Cf. *In the Matter of Electric Bond and Share Co.,* Holding Company Act Release No. 7383 (May 7, 1957) where the Commission ruled upon a request for hearing after it had issued a Rule U-23 Notice of Filing. Rule U-23 is analogous to Rule N-5.

Finally, it may be of interest to note that the only administrative hearings, at least in recent years, in which the full Commission has sat en banc to hear evidence, as distinguished from argument, were the so-called *Dixon-Yates* case which involved the common stock financing application of the Mississippi Valley Generating Company, Middle South Utilities, Inc. and The Southern Company[22] and the *Securities National Corporation* case.[23]

B

CLINICAL DIAGNOSIS OF TYPICAL SEC ADMINISTRATIVE PROCEEDING

I should like briefly to outline the principal procedural steps in a typical administrative proceeding before the SEC, indicating some of the interesting questions with which a lawyer should be prepared to grapple in order adequately to represent his client in such a proceeding.

1. *Notice and Order of Hearing*

An administrative hearing before the SEC is initiated by a Notice and Order of Hearing issued by the Commission, summarizing in some detail the application or other subject of the hearing, stating the issues to be resolved (usually as recommended by the interested Division of the Commission) and specifying the date and place of the hearing.[24] This Notice and Order normally is sent to the company involved, to its stockholders and to those on the Commission's mailing list; it also is published in the Federal Register, except that in those proceedings where no one other than the parties is interested (*e.g.* broker-dealer cases), the Notice and Order is not published in the Federal Register.

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22 *In the Matter of Mississippi Valley Generating Company*, Holding Company Act Release No. 12,794 (February 9, 1955).

23 *In the Matter of Securities National Corporation*, Securities Exchange Act Release No. 4866 (May 29, 1953), *aff'd sub nom, Wallach* v. *S.E.C.* 206 F. 2d 486 (C.A.D.C., 1953).

24 Rule III(a) of the Commission's Rules of Practice has been amended recently to require that only the "parties or persons entitled to notice" need be informed of the time, place and nature of the hearing.

Persons wishing to be heard or to participate in such a proceeding are required to submit their applications to the Secretary of the Commission pursuant to Rule XVII of the Rules of Practice, not later than two days before the commencement of the hearing. Such applications should set forth the issues of fact and law to be controverted or any additional issues believed to be raised by the Notice and Order of Hearing.[25]

2. *"Parties" Distinguished From "Participants" in SEC Hearings*

Aside from proceedings under the Holding Company Act, generally there are only two parties recognized in a SEC hearing: the company and the Division of the Commission charged with enforcement of the statute involved.

Other persons, such as stockholders or an interested state or federal government agency, may seek leave either to intervene or to be heard in such proceedings.

The Commission's Rules of Practice distinguish, in many important respects, between a person admitted as a "party" and a person granted "leave to be heard."

A person may be added as a "party" only by the Commission upon a showing that such person's participation as a party would be in the public interest and "that leave to be heard * * * would be inadequate for the protection of his interests."[26]

It is within the discretion of the Hearing Officer to grant "leave to be heard." The Hearing Officer, in his discretion, may limit the extent of participation by a person granted "leave to

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[25] In *In The Matter of Philadelphia Company*, 25 S.E.C. 702 (1947), the party-company moved to strike the appearances of certain persons who were given leave to be heard, on the ground that such persons failed to state the allegations which they proposed to controvert and any new allegations which they proposed to assert. In denying the motion the Commission noted that while it was desirable to have statements of position from applicants for leave to be heard, in some instances such persons may lack sufficient information to enable them to present a statement. Under such circumstances, they "should be permitted to defer taking an affirmative position until evidence has been developed to a point where the effect on their interests has become evident." (p. 705)

[26] Rule XVII(d). See also, Sec. 19 of the Public Utility Holding Company Act and Sec. 40(c) of the Investment Company Act.

be heard" with respect to such matters as introducing evidence, cross-examining witnesses, submitting proposed findings and conclusions and filing of briefs.[27]

Normally the course of the hearing is controlled by the parties in consultation with the Hearing Officer.

3. *Pre-Hearing Conferences*

Neither the Commission's Rules of Practice nor the Administrative Procedure Act provide for pre-hearing conferences. As a matter of practice, however, pre-hearing conferences between the Staff and company counsel, sometimes in the presence of the Hearing Officer, are held for the purpose of defining or limiting the issues, determining the order of proof and otherwise to facilitate the orderly conduct of the hearing.[28]

The President's Conference on Administrative Procedure[29] recommended that the independent agencies adopt a rule providing for pre-hearing conferences. Ralph H. Demmler, while Chairman of the SEC, vigorously urged the adoption of such a rule by the SEC. To date no such rule has been adopted. I believe that a rule providing for pre-hearing conferences would be helpful to Staff counsel as well as company counsel.

The Commission's Rules of Practice do provide that, during the course of a hearing, conferences may be held by the Hearing Officer for the purpose of simplifying the issues.[30] Such conferences during the course of a hearing frequently are held.

4. *Stipulation of Facts*

Neither the Commission's Rules of Practice nor the Administrative Procedure Act provide for a stipulation of facts to be worked out in advance of the hearing for the purpose of relieving the burden of introducing evidence upon issues which can be stipulated. As a matter of practice, however, it is customary for

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27 Rule XVII(c).

28 *Cf.* S.E.C.'s "Informal And Other Procedures," 17 Code Fed. Reg., Part 202.3, CCH Fed. Securities Rep. Par. 68,203.

29 19 F.R.D. 45, 68.

30 Rule V(e).

the Staff and company counsel to work out what amounts to a stipulation or agreed statement of facts. One problem here involved is whether a stipulation of facts agreed to by the parties, if accepted by the Hearing Officer, is nevertheless subject to objections raised at the hearing by persons granted leave to be heard. This would appear to be a matter appropriately within the discretion of the Hearing Officer.

5. *Pre-Hearing Depositions and Subpoenas*

It is clear that pre-hearing depositions may be taken by the Staff and subpoenas may be issued at the request of the Staff in connection with such depositions, pursuant to the broad subpoena power granted to the Commission under each of the statutes administered by the Commission.[31]

It also seems clear that the Commission has the power to order a deposition to be taken or a subpoena to be issued prior to the commencement of a hearing at the request of a party other than the interested Division of the Commission.[32]

Neither the Commission's Rules of Practice nor the Administrative Procedure Act authorize the taking of depositions nor the issuance of subpoenas prior to the hearing at the request of any person other than a party; thus, an "interested person" or a person "granted leave to be heard" has no standing to request that pre-hearing depositions be taken or that subpoenas be issued prior to the hearing.

As a matter of practice the Commission rarely orders the taking of a deposition or the issuance of a subpoena after the issuance of the Notice and Order of Hearing and prior to the commencement of the hearing.

6. *Procedure at the Hearing*

The hearing itself, presided over by a Hearing Officer, is conducted very much like a proceeding in court, particularly with

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31 See, Section 19(b), Securities Act of 1933; Section 21(b), Securities Exchange Act of 1934; Section 18(c), Public Utility Holding Company Act of 1935; Section 321(a), Trust Indenture Act of 1939; Section 42(b), Investment Company Act of 1940; Section 209(b), Investment Advisers Act of 1940.

32 Rules V(f) and VII(a) of the Rules of Practice.

respect to the order of proof, examination of witnesses, marking of exhibits and arguments.

The principal test for admissibility of evidence is that of relevance; the usual rules of evidence need not be strictly applied in an SEC administrative proceeding.[33] Since the Hearing Officer in his discretion, however, may insist that the conventional rules of evidence be adhered to or he may permit relaxation of such rules, the safest course is for counsel to be prepared to proceed in accordance with the conventional rules of evidence.

Questions of privilege with respect to testimony or documents sought in SEC administrative proceedings are determined in accordance with the established principles of evidentiary privilege.[34]

The Hearing Officer customarily conducts the hearing in such a manner as to accommodate the parties and persons granted leave to be heard with respect to such matters as taking witnesses out of order, deferring cross-examination or redirect examination and adjournments. Normally, absent unusual circumstances such as accommodation of out-of-town witnesses, the Staff withholds its cross-examination of all witnesses until the company's direct examination of all witnesses has been concluded. Likewise, where the company is the moving party, the Staff frequently does not present its affirmative case until after it has had an opportunity to examine the transcript of the company's entire case; this is to enable Staff trial counsel, after conferring with the Division Director, to determine the extent of affirmative evidence to be adduced by the Staff in the light of the company's case and, in appropriate cases, whether the Staff should take an adversary position.

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33 "The common law rules of evidence are not applicable in administrative proceedings, even those of a judicial character, in the absence of a specific statutory provision. * * * Evidence to be admissible needs to be only such as reasonable minds might accept, though like minds might not do so." *In the Matter of The United Light and Railways Company*, 32 S.E.C. 550, 571, (1951); see also, Rule V(e) of Rules of Practice.

34 See, *e.g. S.E.C.* v. *Harrison*, 80 F. Supp. 226 (D.D.C. 1948) (attorney-client privilege sustained); *cf. McMann* v. *S.E.C.*, 87 F. 2d 377 (C.A.2, 1937) (customer unsuccessful in preventing his brokers from complying with SEC subpoenas duces tecum).

7. *Staff Role at Hearing*

The Staff usually takes an adversary position in such essentially enforcement proceedings as stop-order proceedings under the Securities Act of 1933 and broker-dealer proceedings under the Securities Exchange Act of 1934.

In proceedings under the Holding Company Act or the Investment Company Act, the Staff does not necessarily take an adversary position; its function is primarily to see to it that a complete, accurate factual record is developed, upon which the Commission may act in its quasi-judicial capacity.

In proceedings where the Staff does not take an adversary position, the Hearing Officer frequently relies upon the Staff for advice during the course of the hearing, given in open hearing and on the record, with respect to such matters as the admissibility of evidence, the issuance of subpoenas and the granting of adjournments; in short, the Hearing Officer relies upon the Staff to shape the course of the hearing. Of course when the Staff takes an adversary position, the Hearing Officer is less inclined to rely on the Staff.

8. *Issuance of Subpoenas During Hearing*

Clearly a subpoena or a subpoena duces tecum may be issued by the Hearing Officer during the course of the hearing at the request of a party.[35] While the question is not entirely free of doubt, there appears to be no authority for the issuance of a subpoena or a subpoena duces tecum at the request of a non-party during the course of the hearing.[36]

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[35] In *Columbia Gas & Electric Corporation*, 11 S.E.C. 332 (1942), the Commission in ruling upon the request for a subpoena by a party, stated that "it is the settled policy of this Commission that, upon request, subpoenas *ad testificandum* are issued by the trial examiner as a matter of course." (p. 337).

[36] Compare Rules V(e) and V(f) of the Commission's Rules of Practice with Section 6(c) of the Administrative Procedure Act which provides that agency subpoenas "shall be issued to any party upon request." On two occasions the Commission has spoken of the issuance of subpoenas duces tecum after the commencement of hearings. *In the Matter of Portland Electric Co.*, 12 S.E.C. 895 (1943); *In the Matter of Market Street Railway Co.*, 26 S.E.C. 752 (1947). In each case (both under the Holding Company Act) the subpoenas were sought by a Committee for preferred shareholders. The opinions, however, are silent on the question of whether the preferred shareholders were "parties" to the proceeding.

9. *Expert Witnesses*

An important decision by the Commission establishing standards of disinterestedness for expert witnesses in SEC administrative proceedings was rendered in the case of *In Matter of North River Securities Co., Inc.*[37]

In that case the Commission rejected the testimony of two real estate appraisers because (i) one expert saw the other expert's appraisal before preparing his own; (ii) the compensation of one expert for testifying was left open and the compensation of the other expert for testifying, as well as for his appraisal, was left open; and (iii) the record did not show what factors were to determine the amount of compensation to be received by the appraisers for testifying.

In order to meet the *North River* standards of disinterestedness for expert witnesses, therefore, it is suggested that (1) counsel, rather than the client, should interview the expert prior to the hearing; (2) a retainer agreement should be entered into with the expert fixing in advance his compensation for (a) preparing his report, (b) preparing to testify and (c) testifying; and (3) under no circumstances should any expert in a case confer with any other expert reporting or testifying on similar matters in the case either before or during the hearing.

10. *Post-Hearing Procedures*

Upon the conclusion of the hearing, normally the following steps are taken:[38]

a. Record is certified to the Commission.

b. Parties submit to the Hearing Officer proposed findings of fact, conclusions of law and briefs.

c. Recommended decision is filed by the Hearing Officer with the Commission.

[If the parties waive the Hearing Officer's recom-

[37] Investment Company Act Release No. 2459 (December 20, 1956).
[38] See Rules IX–XII of the Rules of Practice.

mended decision, they submit their proposed findings, conclusions and briefs directly to the Commission rather than to the Hearing Officer.]

d. Within 5 days after the Hearing Officer's recommended decision is filed, the parties may file exceptions thereto; objections to the Hearing Officer's recommended decision, unless preserved by timely exceptions, are deemed abandoned.

e. The parties then submit their proposed findings, conclusions and briefs to the Commission, after which the case is set down for oral argument before the Commission unless the oral argument is waived.

f. The Commission in due course renders its decision, including its findings of fact and conclusions of law. The Commission is assisted in the preparation of its opinion by the Division of Opinion Writing, unless the parties stipulate that the Staff of the interested Division of the Commission may assist the Commission in the preparation of the opinion.[39]

11. *Hearing Officer Role*

SEC administrative hearings normally are presided over by one of the SEC Hearing Officers, either at the main office of the Commission in Washington, D.C. or at some other place convenient to the parties and witnesses. Occasionally, in hearings to which the Administrative Procedure Act does not apply,[40] the Commission designates a member of its Staff to sit as a Hearing Officer.

An important recent decision in the area of administrative procedure, particularly with respect to the weight to be accorded

[39] Such assistance by the interested Division in the preparation of the opinion is permitted in certain cases even absent a stipulation. Administrative Procedure Act, Section 5(c). The parties are encouraged to make clear their positions on such matters "as early as practicable in the course of the hearing." Rule III(e) of the Rules of Practice.

[40] Administrative Procedure Act, Section 7(a).

findings and conclusions in a recommended decision by a SEC Hearing Officer was rendered by the Court of Appeals for the Third Circuit on October 24, 1957 in *Matter of The United Corporation* involving applications for the allowance of fees and expenses in connection with two reorganization plans under the Holding Company Act.[41] The Hearing Officer made findings as to the number of compensable hours devoted by the applicant to the reorganization proceedings and the amount of reimbursable expenses, and recommended allowances on this basis. The Commission found that it was impossible to determine the number of compensable hours and the amount of reimbursable expenses from the record, principally because the time and expenses applied to collateral and unproductive matters could not be segregated, and made allowances in amounts lower than those recommended by the Hearing Officer on the basis of its appraisal of the contribution made by the applicants to the reorganization proceedings. The Court of Appeals reversed the order of the District Court approving and enforcing the Commission's order on the ground that it was not supported by substantial evidence and was not made in accordance with applicable legal standards in that the Commission rejected the specific findings of the Hearing Officer without making express new findings. The Court of Appeals said:

> "That this violates the unequivocal mandate of the law is clear. As to every material issue presented, an administrative agency must make findings of fact. Further, where the agency fails to adopt the findings of the hearing examiner, the Act requires the agency to make a finding or ruling on each exception taken to the intermediate report. The Order of the Commission here fails to meet these standards. A bare conclusion is insufficient even when prefaced by a statement that it was reached after

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[41] 249 F. 2d 168 (C.A. 3, 1957). For a contrary view of the functions of the Hearing Officer and the weight to be accorded his findings and conclusions, *cf. Pierce* v. *S.E.C.*, 239 F. 2d 160 (C.A.9, 1956).

> careful consideration of all the evidence, as here. Strikingly applicable here is the much-quoted statement of Justice Cardozo that '[W]e must know what a decision means before the duty becomes ours to say whether it is right or wrong.'"[42]

The Third Circuit thereupon made its own finding which in effect reinstated the Hearing Officer's finding. The Commission's petition for a rehearing before the Third Circuit en banc was denied.[43]

C

DECALOGUE FOR THE SEC PRACTITIONER

While I do not claim any special insight into what constitutes conduct best calculated to achieve successful results in proceedings before the SEC, I do take the liberty of suggesting the following ten simple rules[44] and I assure you that back of each is one or more more instances of actual experience either as a member of the SEC Staff or as a private practitioner before the Commission.

1. Cooperate fully and candidly with the Staff.
2. Do not seek appointments with individual members of the Commission.
3. Do not request your Senator or Congressman to intervene with the Commission.
4. Be sure that the Notice and Order of Hearing adequately states the issues to be determined.

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42 249 F. 2d 168, 181 (C.A. 3, 1957).

43 249 F. 2d 168 (C.A. 3, 1957). Since this Address was given, the Commission has decided not to apply to the Supreme Court for certiorari.

44 Authority for proposing a Decalogue from this rostrum is the well-known one proposed by Judge McLean's and my early preceptor in the law, John W. Davis, in his address "The Argument of an Appeal" delivered from this platform on October 22, 1940 under the auspices of the Committee on Post-Admission Legal Education of this Association (reprinted in JURISPRUDENCE IN ACTION, p. 175, 1953).

5. Avail yourself of all appropriate pre-hearing procedures, whether provided for by the rules or in accordance with established practice, including:

   Prompt raising of jurisdictional questions

   Pre-hearing conferences

   Pre-hearing stipulations

   Pre-hearing depositions.

6. Be as thoroughly prepared for a SEC administrative hearing as you would be for a court trial, including:

   Witness sheets

   Schedule of exhibits

   Memoranda of law

   Trial brief

   Draft of proposed findings of fact and conclusions of law.

7. Make a complete record at the hearing—always with an eye to a possible appeal.

8. Stimulate an interest on the part of the Hearing Officer in your case.

9. Do not bull your way by indiscriminate subpoenaing of SEC personnel or records.

10. If you are a former SEC member or employee, be sure your Rule 6(b) file is in order.

Economic Proof in Section 7 Cases

By EPHRAIM JACOBS

In preparation for this discussion I have read several economic articles written by Professor Adelman and other economists, so if he recognizes his own substance in somewhat mangled form, it is more than purely coincidental.

From these readings I have found that, in studying an industry for merger evaluation purposes we may group the economic factors into three principal categories: namely, market structure, market conduct and market performance. Market structure factors relate principally to the industry environment within which a firm operates, and might include such data as the number and size of sellers and buyers, the location of sellers and buyers, the nature of the product sold, the nature and sources of raw materials used, the pattern of entry into and exit from the industry. Market conduct factors relate primarily to the decisions a firm makes in conducting its business and adapting itself to the market in which it operates. These might include the firm's method for determining prices, where it will buy and sell, how it will promote its sales, how it will adjust to the activities of competitors. Market performance factors generally deal with the picture of the industry that develops from market structure and market conduct factors. For example, is the industry performing efficiently, is it profitable, are plants efficiently located in reference to markets, is capacity being utilized, do the products meet the requirements of the buyers, is there a high degree of technical progress in the industry.

Obviously, in studying an industry it would be possible to pursue almost endless inquiry into factors of market structure, conduct and performance. I am informed, for example, that in some universities the business schools and economics depart-

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Editor's Note: Mr. Jacobs, formerly Chief of the Legislation and Clearance Section of the Antitrust Division of the Department of Justice, is now practicing law in the District of Columbia. Mr. Jacobs' paper was delivered before the Association's Section on Trade Regulation, of which Edgar E. Barton is the Chairman.

ments use a list of about 150 questions to analyze an industry. The answers to just a few of these might in themselves constitute a major economic undertaking. Admirable as this thoroughgoing economic approach might be for some purposes, I am not sure it is adaptable to what I consider to be the less stringent standards of economic proof required in Section 7 Clayton Act cases. From comments appearing in Section 7's legislative history, I do not believe Congress intended that each Section 7 proceeding should give rise to a detailed economic extravaganza inquiring into every facet of an industry. Indeed, limitations upon our own ability as lawyers to present such data to courts, and upon a judge's time and ability to digest and analyze extremely comprehensive economic data, suggest the desirability, if not the necessity, of a reasonable approach to the presentation of economic proof. The Supreme Court in the Standard Stations case (*Standard Oil Co. of California, et al.* v. *United States,* 337 U.S. 293, 310), I believe, condemned any "standard of proof . . . virtually impossible to meet" or "at least most ill-suited for ascertainment by courts." Only a few judges, if any, have available the services of an economic assistant.

Congress, recall, rejected a Sherman Act standard and embraced the concepts of "incipience" and "reasonable probability." However indefinite these guides may be, they are in my opinion indicative of an intended congressional approach, which we, as lawyers, must make every effort to fulfill.

Do not conclude from what I have said that I minimize the importance of *all* economic proof. I appreciate the fact that every acquisition is not illegal, and, that in contrast to a *per se* violation of the Sherman Act, it is necessary in considering the legality of an acquisition to look to something beyond the mere act. And that something generally consists of economic data. Precisely how much economic data is necessary will admittedly vary with the situation. But I believe that Congress, in the Reports which explain Section 7, gave us a general guide to appropriate areas of economic inquiry.

As most of you know, the basic inquiries under Section 7

relate to a delineation of a line of commerce (LOC), a section of the country (SOC), and whether there is a reasonable probability of a substantial lessening of competition or a tendency toward monopoly with respect to the LOC and the SOC. The Senate Report (No. 1775, 81st Cong. 2d Sess.) states that the purpose of the Act "is to limit future increases in the level of economic concentration resulting from corporate mergers and acquisitions." The House Report (No. 1191, 81st Cong., 1st Sess.) after discussing certain background concentration data stated: "Such in general outline is the broad economic problem of high and increasing concentration with which this legislation is concerned." Thus, it would seem to me that an economic study of a particular acquisition should, for one thing, inquire into the concentration pattern of the industry involved. The Senate Report indicated rather clearly that the law was designed to arrest a tendency toward oligopoly.

An additional framework for economic inquiry is outlined elsewhere in the House Report where it is stated that the illegal effect proscribed by the bill may arise in various ways:

> "such as elimination in whole or in material part of the competitive activity of an enterprise which has been a substantial factor in competition, increase in the relative size of the enterprise making the acquisition to such a point that its advantage over its competitors threatens to be decisive, undue reduction in the number of competing enterprises, or establishment of relationships between buyers and sellers which deprive their rivals of a fair opportunity to compete."

While these tests are perhaps intended to be merely illustrative, they serve, I believe, as a convenient focal point for economic study.

In considering what type of economic data should be developed, we are fortunate to have as an object study, a somewhat comprehensive opinion in the American Crystal Sugar case (*American Crystal Sugar Co.* v. *Cuban-American Sugar Co.*, 152

F. Supp. 387). There the court discussed economic factors relating to LOC, SOC, and effects on competition. As to LOC, the court had to decide whether refined beet sugar sold by plaintiff, and refined cane sugar sold by defendant, could be taken together as a single LOC. In deciding that refined sugar, including both beet and cane, was the appropriate LOC, the court relied principally on the following factors: (1) There was practically no quality difference between the two; (2) Although cane sugar had a higher degree of consumer acceptance because of the well-known brands of the dominant refiners, it could be displaced by beet sugar when a determined effort was made to market beet sugar; (3) Most industrial users purchased either beet or cane sugar, depending upon their price; (4) Cane and beet sugar were sufficiently interchangeable to be classified within the same market—or, if I might attempt to state the conclusion as the court in the du Pont case might have put it (*United States* v. *E. I. du Pont de Nemours & Company, et al.*, 353 U.S. 586, 593–594): neither beet sugar nor cane sugar had sufficient peculiar characteristics and uses to constitute one of them a product sufficiently distinct from the other. (Cf. *In the Matter of Crown Zellerbach Corporation*, C.C.H. 1957, Trade Regulation Reporter, ¶26,923).

Turning next to the question of SOC, the court cited the following factors in support of a ten-state area: (1) The acquiring and acquired companies concentrated their principal sales efforts there; (2) the area was bordered by cane and beet refineries, including those of the two companies; (3) the demand for sugar in that area constituted a natural locus of distribution for those refineries, because sellers tried to make heavy sales in areas surrounding their plants; (4) the impact of freight rates on sugar prices tended to separate this area from adjoining areas, it being difficult for plants on the east and west coasts to participate in the area. In addition to the ten-state area, the court said there were similar justifications for adopting a three-state area within the larger area. (Cf. *In the Matter of Crown Zellerbach Corporation*).

After delineating the LOC and the SOC, the court then appraised the effects of the acquisition. It considered numerous

factors, most of them economic. I believe it would be desirable to run through these, because we have here what may well approach a pattern of economic proof for future Section 7 cases —at least when a horizontal merger or acquisition is involved. The court, on the question of effects, took into account the following:

1. The nature of the product manufactured and sold by the plaintiff and the defendant—beet sugar for American and cane sugar for Colonial (the defendant's sugar-selling subsidiary).

2. The sources of the product. Beet sugar is a domestic product whereas cane sugar is imported from Cuba, the Philippines, etc.

3. The markets in which each company sold substantial amounts of the product. As I have indicated, the principal market was considered by the court to be a ten-state area. However, the court also discussed a three-state area within the ten-state area and a single state within the three states.

4. The market position of the two companies in the relevant area. The court found that a union of Crystal and Colonial would result in a combination ranking second in the ten-state territory. In the three-state territory a combination of Crystal and Colonial would rank about third.

5. The value and the amount by hundredweight of the product sold by each company in the ten-state area, and the percentage relationship between these sales and the total amount of the product sold in the ten-state area. For example, the court found that for 1956 within the ten-state area the two companies sold approximately 13.8% of all the sugar marketed in that area. The court did not indicate what percentage of the market was occupied by the number one company in the ten states, so we do not know whether the 13.8% was a lot less or just a little less than the share of the market enjoyed by the number one company. Similarly, the court did not indicate how much larger the 13.8% was than the percentages of the smaller sellers in the market. In addition to considering the market percentages for the ten states, the court also mentioned percentages in the three-state area, and also within a single state.

6. Evidence of active and actual competition between the two companies in the market. The defendant was actively seeking to increase its sales in the ten-state area. The plaintiff was also attempting to increase its sales and planned to increase its production in several of the states. There were common customers within the area. Certain purchasers of sugar in the area had, during a five-year period, bought sugar from both companies. The sales to these purchasers represented a substantial portion of all the sales which the two companies made in the area.

7. The national ranking of the companies. On a national basis plaintiff ranked eighth and defendant eleventh in sales of refined sugar. Combined they ranked fourth. The court rejected the argument that, since the two companies combined would be better able to compete with their larger competitors, competition would be increased by the acquisition.

8. The concentration pattern in the industry. The court found that to some extent concentration had resulted from acquisitions rather than from internal growth. The court mentioned acquisitions which had been made by two of the three leading companies in the industry, neither of which was involved in this suit. Related to the concentration picture the court discussed,

9. Whether there was likelihood that new firms would enter the industry. No new firms had entered the industry for at least thirty years. The quota system used in the industry, which I will soon mention, placed a heavy emphasis on historic production and it was difficult to enter the industry through construction of new facilities. The quota system was, therefore, considered "a staunch barrier to new entry." The court concluded that the over-all picture was one of an industry tending toward increased concentration with no significant countervailing pressures.

10. Price behaviour in the industry. Generally, beet sugar processors are responsible for price reductions and cane sugar refiners normally follow. A change in the price of one produces a prompt and corresponding change in the price of the other. The court pointed out that the leading companies whose brands are well accepted do not generally initiate price reductions. On the other hand, Crystal and Colonial would undercut prices to obtain business, especially for industrial sales. Thus, the court reasoned, each of these companies independently makes a significant contribution to competitive conduct by engaging in aggressive price activity, and any coordination of sales between them resulting from a merger or acquisition would reduce the independent contribution which each makes.

11. Other factors relating to the industry.

a. The court took note of the many antitrust cases filed through the years, and commented on the efforts of the industry by various means to stabilize sugar prices.

b. The court detailed the degree of regulation of the industry by the Secretary of Agriculture who limits the amount of sugar which can be marketed, allocates total amounts among producers, assigns production limits to each domestic grower and refiner, collects excise taxes from refiners and pays subsidies to domestic growers from the proceeds of the excise tax.

c. Finally, the court discussed the acquisition in the context of the "quota system." For many years, federal legislation had established a limit on the marketing of domestic beet sugar, and domestic suppliers had attempted through the years to increase their quotas. This created a conflict between the domestic beet sugar industry and the Cuban cane sugar industry because any increase in the quota of beet sugar would come in large part from the quota of the cane sugar industry. The defendant represented the cane sugar viewpoint, whereas the plaintiff represented the beet sugar viewpoint. Thus, if plaintiff were to come under control of defendant, said the court, it would tend to limit the effectiveness of the plaintiff in representing the views of the beet sugar interests in their conflict with cane sugar interests.

These, then, were the principal economic factors that at least one court considered material in a Section 7 case. It is my own view that the court here was adequately comprehensive; indeed, other cases may not require the full treatment of this case. And the approach used here might not apply to vertical acquisitions, where the inquiry might deal not only with some of the above, but may also center more on buyer–seller relationships and potential effects on third parties, or to conglomerate acquisitions, with respect to which I am not sure what the approach should be.

Conglomerates, to me, raise the most difficult problems of economic analysis. Take, as a hypothetical example, an acquisition by an automobile battery manufacturer of a candy manufacturer. This, on its face, does not appear to lend itself to the customary type of economic analysis that a lawyer, at least, can understand. By the acquisition itself there is not, automatically, in either the battery or the candy industries any elimination of a competitor, any increase in concentration, any joinder of distribution systems selling allied products, any enhanced control over a raw material, any combination of related research facilities, or any of the other factors that we usually look for. On the other hand, if the same battery manufacturer were to acquire a spark plug manufacturer, more promising areas for economic analysis would be present. While the products involved in the acquisition are basically different, they might nevertheless support some degree of integration in the operations of the acquiring and acquired companies. For example, many of the same customers may buy both batteries and sparkplugs for distribution either at wholesale or retail. Thus there may be a combination of distribution facilities as a result of the acquisition. The availability of both products to one seller might enhance the sale of each, or increase the leverage of the seller. In addition, research in one field may be useable or applicable in the other. It may be too, that the manufacture of both products would require some of the same raw materials, and there may be effects on the suppliers of these materials.

A meaningful economic analysis of a conglomerate acquisition might require an evaluation of potential effects in the markets

of both the acquiring and acquired companies. A study of the structure and behaviour of each market in the pre-merger situation, and its post-merger probabilities, may be necessary. If the acquiring company has tremendous resources, and moves into an industry occupied by a large number of small units, the whole character of the industry could change. The small units might suddenly find themselves at a tremendous disadvantage because of the disparity in size vis-a-vis the acquiring company, and a tendency toward monopoly could result. If an industry consists mostly of small units, it is probable that entry is not difficult and may be accomplished through low investment. The replacement of one of the small units by an industrial giant may raise new entry barriers, and deter new smaller competitors from entering the field. So, difficult as it may be to evaluate the probable anti-competitive effects of a conglomerate merger, I believe there are nevertheless standards for such evaluation which, of course, will vary with the particular merger.

While we may differ as to the amount and character of economic proof necessary in Section 7 cases, I am sure we all agree that the economist's role is of signal importance. This, of course, is true as to nearly every antitrust case. Recognizing this, Judge Hansen designated as Chief of our Economic Section, Mr. Lewis Markus who, with many years of antitrust case experience is, in my opinion, a rare blend of the practical and the theoretical. Our Economic Section has about 30 people, including senior economists, statistical clerks and clerical assistants. They play an important part in the development of a Section 7 case.

The first step in the initiation of a Section 7 investigation is normally the issuance of a letter of inquiry to the acquiring and acquired companies to elicit basic data. Much of this data is of an economic character. Generally, one of the economists on our staff will participate with the lawyers in preparing the list of questions. His precise role at this stage will vary with the complexity of the situation. Upon receipt of the requested information the lawyers will again call upon the economist to assist in the evaluation of the data. Should a case eventually be filed, the

economist becomes a very important cog in the litigation machinery. There is at least one economist assigned to each of our pending Section 7 cases. He works closely with the lawyers in suggesting what areas should be probed, what information should be developed and in what form it might be presented at the trial so that it will be meaningful to the court. The preparation of economic tables and charts might be one of the most important projects of the case. The economist's role may extend beyond mere preparation, as he may also be utilized as a witness at the trial.

From this brief review of the economist's participation in Section 7 preparation and trial, I hope you will agree that the Antitrust Division recognizes the importance of economic proof to this particular type of case. We are really on the threshold of Section 7's development. I think that in deciding where we go and what we end up with, the role of the economist will be just as important as that of the lawyer.

Recent Decisions of the United States Supreme Court

By SAMUEL C. BUTLER and DONALD CRONSON

PEREZ *v.* BROWNELL

TROP *v.* DULLES

NISHIKAWA *v.* DULLES

(March 31, 1958)

These cases involve the power of Congress to expatriate American citizens. The *Perez* case decided that Congress can constitutionally enact that a native born citizen who votes in a political election in Mexico shall lose his American citizenship. *Trop* decided that Congress may not constitutionally enact that any soldier convicted of desertion and dishonorably discharged from the service therefor shall lose his citizenship. *Nishikawa* concerned a statute which forfeits the citizenship of any American who serves in the army of a foreign state; no decision on the constitutional issues was reached, since the Court held that the Government had not sustained its burden of showing that the act of joining the foreign army was "voluntary"—*i.e.*, free of duress. The three decisions produced twelve different opinions; in *Trop* no opinion was adhered to by a majority of the Court.

It has long been an essential tenet of United States foreign policy that any citizen of any country has a natural right to expatriate himself. And it has long been assumed—and is assumed by all members of the present Court—that Congress may validly enact a statute consenting to or ratifying such voluntary expatriation. In *Mackenzie* v. *Hare*, 239 U.S. 299 (1915), the Supreme Court took the first step beyond that point by affirming the power of Congress to expatriate a native born citizen whose desire to abandon American citizenship was found on the basis of a legal fiction. Mrs. Mackenzie was a native born American citizen who married an Englishman and continued to reside after marriage in the United States. An act of Congress in effect at the time of her marriage provided that an American woman marrying a foreign citizen lost her American citizenship during coverture. Mrs. Mackenzie contended that, notwithstanding the statute, she intended to retain her American citizenship when she married, and that Congress did not have power to take away her citizenship without her consent. The Supreme Court rejected her argument, holding that she had for constitutional purposes consented to the loss of her citizenship when she married Mr. Mackenzie:

> ". . . It may be conceded that a change of citizenship cannot be arbitrarily imposed, that is, imposed without the concurrence of the citizen. The law in controversy does not have that feature. It deals

with a condition voluntarily entered into, with notice of the consequences. . . ." (311–312)

This approval of non-consensual expatriation was reaffirmed by the Court in *Savorgnan* v. *United States*, 338 U.S. 491 (1950), in which it was held that Congress could constitutionally determine that a woman who married an Italian national, applied for and received Italian citizenship, and thereafter lived in Italy, lost her American citizenship. To her contention that her citizenship could not be taken from her since she had never intended to give it up, the Court stated that

". . . the acts upon which the statutes expressly condition the consent of our Government to the expatriation of its citizens are stated objectively. There is no suggestion in the statutory language that the effect of the specified overt acts, when voluntarily done, is conditioned upon the undisclosed intent of the person doing them." (338 U.S. at 499–500)

Such was the state of the law before March 31st of this year.

The narrowest view of the powers of Congress was that maintained by Justices Black and Douglas, which is set forth in Justice Black's concurring opinion in *Nishikawa* (in which Justice Douglas concurred) and in Justice Douglas' opinion in *Perez* (in which Justice Black concurred). They rely upon the language of the Fourteenth Amendment to the effect that "All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States . . ." as precluding the enactment of legislation depriving any native born citizen of his citizenship unless it is his subjective desire to lose American citizenship. Justice Black in *Nishikawa* states that "To the extent that [*Mackenzie* and *Savorgnan*] applied principles contrary to those expressed in this opinion I believe they are inconsistent with the Constitution and cannot be regarded as binding authority." (Justice Douglas' *Perez* opinion indicates that he considers *Mackenzie* and *Savorgnan* to be consistent with the Black-Douglas view since acquisition of another nationality, which occurred in both cases, necessarily imports a desire to surrender American nationality; however, the reported opinions in both those cases make it clear that each of the ladies there involved lost her citizenship despite a clearly established subjective desire at all times to remain an American citizen, notwithstanding the acquisition of an additional nationality.)

The position of the Chief Justice on the extent of congressional power is a bit behind that of Justices Black and Douglas. While the Chief Justice also believes that the Fourteenth Amendment generally precludes Congress from withdrawing citizenship conferred under that Amendment, he recognizes the right of Congress to confirm loss of citizenship not only in those instances where the citizen subjectively desired its loss, but also in circumstances where he performs an act that can rationally be said necessarily to import a desire to abandon American citizenship. "The citizen may elect to renounce his citizenship, and under some circumstances he may be found to have abandoned his statuts by voluntarily performing acts that compromise

his undivided allegiance to his country." However, in the opinion of the Chief Justice neither the act of voting in a foreign election, nor desertion of the sort present in *Trop* (who was convicted of desertion when he escaped from an army stockade and remained away for 24 hours before returning under circumstances that appear to have been voluntary) is such an act. Mr. Justice Whittaker's position on the power of Congress seems generally to coincide with that of the Chief Justice.

The remaining five members of the Court accord to the Congress substantially greater constitutional authority to declare expatriation by legislation. They answer the Fourteenth Amendment argument by pointing out that nothing in that Amendment states that persons born in the United States shall *remain* citizens of the United States. Thus, a footnote to Mr. Justice Frankfurter's majority opinion in *Perez* states in part that ". . . there is nothing in the terms, the context, the history or the manifest purpose of the Fourteenth Amendment to warrant drawing from it a restriction upon the power otherwise possessed by Congress to withdraw citizenship."

For the majority of the Court then, the problem is whether or not the statutory forfeiture of citizenship was enacted in pursuance of one of the powers expressly or impliedly granted to Congress under the Constitution. The Constitution nowhere expressly grants to Congress the power to determine who shall or who shall not be a citizen, or to remove citizenship once granted. In *Perez,* a majority of the Court find power to enact a statute revoking citizenship of persons who vote in a foreign political election in the general power of the Congress to regulate foreign affairs. The Constitution nowhere expressly grants to Congress the power to regulate foreign affairs; however, the *Perez* majority opinion holds that, since the regulation of foreign affairs is one of the powers indispensable to the effective functioning of a sovereign government, such power must have been granted to the Congress. The majority reason that, since the action of an American citizen in voting in a foreign election might in some instances operate to further the interests of a foreign country to the detriment of those of the United States, and might in other instances operate to cause friction between the United States and the government in which the citizen voted, the Congress could properly take action to avoid those undesired consequences by providing that any citizen who votes in an "election of political significance" in a foreign state should lose his citizenship. Mr. Justice Whittaker's dissenting opinion in *Perez* takes issue with this reasoning; it is his position that, while Congress might constitutionally enact such legislation for the purpose of preventing American citizens from voting in foreign elections in which they could not legally vote under the law of the foreign country holding the election, there is no rational basis for prohibiting American citizens from voting in elections held in a country under whose law they may lawfully vote. Since the record did not show that Perez' action in voting in Mexican elections was unlawful under Mexican law, Justice Whittaker concludes that the statute cannot constitutionally deprive *Perez* of citizenship.

In *Trop*, the opinion of Mr. Justice Frankfurter, in which Justices Burton, Clark and Harlan joined, finds congressional power to enact the statute there involved in Congress's power to regulate and maintain armies and to prosecute war. Justice Frankfurter reasons that such legislation might deter the would-be deserters, and improve the morale of the troops generally. Mr. Justice Brennan, who sided with the majority in *Perez*, does not agree. While conceding that it is paradoxical to hold that a citizen who commits the serious crime of desertion cannot be deprived of his citizenship, while the citizen who votes in a foreign state can, he concludes that the enactment stripping convicted deserters of citizenship was not "a means reasonably calculated to achieve" the objective of dealing with desertion. Justice Brennan's opinion is reminiscent of the days of substantive due process; it invokes for the protection of citizenship the same sort of logic that was once used to protect property. He reasons that the statute does not operate to rehabilitate the deserter since it in fact makes him an outcast. "Certainly it will not insulate society from the deserter, for unless coupled with banishment the sanction leaves the offender at large. And as a deterrent device this action would appear of little effect, for the offender, if not deterred by thought of the specific penalties of long imprisonment or even death, is not very likely to be swayed from his course by the prospect of expatriation." Justice Brennan "simply cannot accept a judgment that Congress is free to adopt any measure at all to demonstrate its displeasure and exact its penalty from the offender against its laws." To him, ". . . Congress' asserted power to expatriate the deserter bears to the war powers precisely the same relation as its power to expatriate the tax evader would bear to the taxing powers." The "necessarily slender" support given the war effort by application of the "especially demoralizing sanction" of expatriation is so "slight or tenuous" that "I can only conclude that the requisite rational relation . . . does not appear. . . ."

The opinion of the Chief Justice in *Trop* (in which Justices Black, Douglas and Whittaker concurred) urges that expatriation is a "cruel and unusual punishment." Justice Brennan's opinion does not appear to take any position on this question. Justice Frankfurter's opinion asserts that expatriation is not a punishment, analogizing it to loss of civil rights on conviction of a felony, and that if it be considered a punishment it is not cruel and unusual for a crime which has long been punishable by death. (The Chief Justice's answer is that "the existence of the death penalty is not a license to the Government to devise any punishment short of death . . .")

Nishikawa, the case involving service in a foreign army, produced no opinion concerning constitutional issues except the concurring opinion of Justice Black. Justices Harlan and Clark, who dissented, assume, without discussion, that Congress can constitutionally expatriate a citizen who serves in a foreign army. The other seven members of the Court all conclude that the statute is not applicable to one who joined a foreign army under duress. Although the reasoning of those Justices differ, all agree that the Government had the burden of showing that Nishikawa was not

acting under duress when he joined the Japanese army, under conscription, during World War II, and that the burden had not been maintained.

* * *

The only conclusion that can safely be drawn from the welter of opinions is that Congress can constitutionally expatriate a citizen who has no desire to abandon his citizenship if its action in so doing appears reasonable to Mr. Justice Brennan.

* * *

All members of the Court, in varying degree, appear to have entertained a reluctance to entrust to the Congress complete power to determine who shall and who shall not retain or lose American citizenship. This reluctance is most forcefully expressed in the *Perez* dissent of Mr. Justice Douglas. He argues that, if Congress can constitutionally expatriate the citizen who votes in a foreign election, it would seem also to have power to expatriate the citizen who does not pay his taxes and perhaps even a citizen who espouses political doctrine contrary to what the Congress considers to be in the best interest of the United States. The opinion of Justice Frankfurter answers these arguments with Holmes' cryptic "not while this Court sits," plus an eloquent discourse on judicial self-restraint. And indeed, even if Congress does have the power to pass all those acts that Mr. Justice Douglas so dreads, it does not follow that such power will be exercised, at least so long as this country maintains a republican form of government. On the other hand, there is probably no field where an elected legislature is more likely to be emotional and irrational than it is when dealing with problems of citizenship. And a little analysis will show that even Mr. Justice Frankfurter and his colleagues were not willing to grant the Congress a free hand to deal with the question of who should and who should not be expatriated.

It is perhaps sophistry to justify or reject expatriation legislation on the basis of its impact upon the conduct of foreign relations or the maintenance of armies. When it enacted the statutes in question, Congress rather clearly was not motivated by a desire to minimize international friction or to increase army morale. It was simply exercising a judgment that certain classes of persons, who had committed acts which it considered disloyal, were not worthy of retaining American citizenship. It is interesting that no member of the present Court appears to grant to the Congress general power (subject only to due process, prohibition against cruel and unusual punishments, and other constitutional limitations) to determine the conditions under which citizenship shall be lost or retained. It is not logically inevitable that Congress should not have that power. It is true that the Constitution does not expressly confer such power upon Congress; but neither does it expressly confer upon Congress power to regulate foreign affairs. If it possesses the foreign affairs power as a necessary attribute of sovereignty, why should it not have the citizenship power on similar rea-

soning? The Court's apparent negative answer to that question would seem to spring not so much from logic as from a reluctance even upon the part of the *Perez* majority to give Congress general control over expatriation. Even Mr. Justice Frankfurter and his colleagues would require that the expatriation power be hitched, albeit loosely, to some other enumerated or necessarily inferred constitutional power. The essential difference between Justice Frankfurter and Justice Brennan is that Justice Brennan requires a somewhat tighter hitching than would Justice Frankfurter.

Recent Decisions of the New York Court of Appeals

By SHELDON OLIENSIS and BARRY H. GARFINKEL

COX *v.* NEW YORK

(3 N.Y. 2d 693, February 27, 1958)

A recent Court of Appeals decision deals with a predicament particularly frustrating to litigating lawyers: the dismissal of a cause of action supported by evidence whose trustworthiness was apparently unquestioned, because of its inadmissibility under the technical rules of evidence.

The estate of a deceased incompetent, Mary McGrath, brought suit against the State in the Court of Claims for personal injuries suffered by the incompetent in a State mental hospital as the result of an assault by another inmate, Helen Lantz. The complaint alleged negligent failure to provide adequate supervision.

Only the two incompetents were present at the time of the assault; both died before trial. The only evidence that the assault had taken place consisted of two entries in the hospital records.

The first was an accident injury report which read "Patient Helen Lantz stated that patient McGrath [had] come into her room * * * she told patient McGrath to get out and gave her a little push on the arm, and patient fell to the floor."

The second consisted of "clinical notes" made by the staff attendant in charge of the ward which read "Pt. Lantz pushed pt. M. McGrath to the floor striking right side."

The claimant sought to introduce these entries either as admissions of the State or as business entries under Section 374-a of the Civil Practice Act. The evidence was admitted by the Court of Claims which gave judgment for the claimant. On the ground that such evidence had been improperly admitted, the Appellate Division, Third Department, reversed the judgment and dismissed the claim; such reversal was affirmed by the Court of Appeals, four to three.

Inadmissibility as an Admission

The majority, through Judge Dye, held, as had the Appellate Division, that the first entry constituted at most an admission that the patient Lantz had made such statement, but not that its contents were factually correct. The admissibility of the second statement, however, created greater difficulties. An early Court of Appeals decision, *Reed* v. *McCord,* had held admissible, as an admission, a statement by a defendant as to the cause of an accident, despite the fact that the defendant patently had no personal knowledge of the facts. Under this rule, the second entry would normally

have been admissible, although the first (which merely recited, without adoption or indorsement, what someone else had said) would not have been.

The Court, however, held that both entries were inadmissible, distinguishing the *Reed* case on two grounds. *One,* the second entry "adds nothing to the information" in the first and was "obviously obtained from the same source"; the absence of the words "Patient Helen Lantz stated" was therefore "without significance."

Two, no member of the hospital staff "had authority to bind the State by admissions based on hearsay." The rationale of *Reed,* the Court stated, is inapplicable where the admission is not by a party but by an employee with no interest in the outcome of the litigation and, hence, no incentive to check carefully the correctness of the statement he makes.

The dissenters made no comment on this portion of the majority's opinion and were in apparent agreement that the evidence could not come in as an admission.

The Court's refusal to apply *Reed* on the facts here presented seems sound, although its language is susceptible to varying interpretations and may lead to drastic limitation of *Reed* by lower courts. In substance, the Court would seem to be holding that it did not necessarily follow from the second entry that the hospital attendant had in fact adopted and endorsed the patient's statement with respect to the assault and that in any event, if she had, she was without authority to make an adoption and endorsement binding upon the State.

Inadmissibility as a Business Entry

The majority rejected in one paragraph the contention that the evidence was admissible as a "business entry" under Section 374-a of the Civil Practice Act, on the ground that the report was not based on information "imparted by persons who were under a duty to impart such information" —a test not present in the statute but engrafted in an earlier Court of Appeals decision.

The three dissenting judges, in an opinion by Judge Desmond, contended that the excerpts from the hospital records were admissible as business entries since they were made in the regular course of business, it was in the regular course of the business to make such entries and their trustworthiness "was conceded by the State itself on the trial." The dissenters noted that the hospital was required by law to keep such records and that it was the duty of the hospital staff to investigate assaults by one patient upon another.

The dissenters cited statements made by attorneys for the State at trial which appeared to acknowledge that the assault had taken place and a stipulation that a doctor on the hospital staff had stated that the assaulting patient appeared to be a reliable person.

While the dissenters did not contend that the patient was under a duty to impart the information to the attendant, they apparently believed that

satisfaction of this requirement was rendered unnecessary by the fact that the patient had personal knowledge of the facts reported and by the extrinsic indications of trustworthiness.

* * *

The decision is noteworthy in several respects. As with many prior decisions, it does not seek to distinguish between two separate exceptions to the hearsay rule: admissions of a party and declarations against interest of a non-party. The distinction is frequently significant since admissions of a party are admissible whether or not "against interest" at the time made and declarations against interest are admissible despite the fact that the declarant is not a party to the action.

The latter exception conceivably might have formed a basis for the admission of the evidence in this case. Thus, the assaulting inmate's statement would appear to be a "declaration against interest" on her part, since it could result in her liability for the resulting injuries; if so, it would be admissible in claimant's action against the State to prove the fact of the assault (assuming, of course, that the evidence was not excludable on the grounds of the inmate's incompetence). Thus, if the hospital attendant had appeared and personally testified to the inmate's statement, such testimony would appear to be admissible and to furnish adequate evidence of the assault.

It is also possible that, through application of two separate exceptions to the hearsay rule, the entries here involved might have been held admissible. The entries in the hospital records would appear to be admissions that Mrs. Lantz had made the statement with respect to the assault (although not of the truth of her statements) and thus equivalent to direct testimony of the attendant to this effect. Or, more tenuously, the entries might be deemed declarations against interest of the attendant herself, who might be subjected to individual liability for the alleged failure to exercise adequate supervision. In either event, once the fact of the entry was admitted, the truth of its contents might be established on the basis outlined above: as a declaration against interest by Mrs. Lantz.

The decision presents the anomaly of the failure of a presumably meritorious case because of technical evidence rules, where the members of the Court never questioned the evidence's authenticity. The result lends point to an approach which some authorities have contended for—that sufficient proof of trustworthiness should serve as a substitute for the more formalistic requirements for admissibility of evidence. Such a sweeping departure from the traditional evidential rules would not, however, seem to be realizable in the foreseeable future.

PEOPLE *v.* BRESLIN

(4 N.Y. 2d 73, February 28, 1958)

Departing from recent judicial trends, the Court of Appeals has ruled that an indigent defendant who believes his conviction erroneous can be compelled to argue his way through appellate courts without the

assistance of counsel—provided that he is armed with a transcript of the trial proceedings.

Breslin, an indigent, was convicted of attempted extortion. In connection with his appeal to the Appellate Division, First Department, Breslin, who had a copy of the trial minutes, requested that he be assigned appellate counsel. His request was denied. Thereupon, *pro se,* he submitted his brief on appeal. No oral argument was heard and the judgment of conviction was affirmed without opinion.

In the Court of Appeals, Breslin's counsel (assigned in that Court) contended that the Appellate Division's failure to assign counsel deprived Breslin of due process.

A divided Court of Appeals (five to two) affirmed the conviction. On the right of counsel question, the majority, per Judge Froessel, held that there is no constitutional or statutory provision requiring the assignment of appellate counsel to indigents. Accordingly, appellate courts in post-conviction proceedings, where the record is available to the court and defendant, "may refuse a request for the assignment of counsel in the proper exercise of discretion."

In so ruling, the Court distinguished its recent *per curiam* decision in *People* v. *Kalan,* 2 N.Y. 2d 278 (1957); 12 Record N.Y. Bar Assn. 229. There the Court had held that refusal to assign appellate counsel to a defendant who was unable to examine the minutes of the trial proceedings "prevented an effective use of the right to appeal in violation of the constitutional guarantees of due process and equal protection." *Kalan* was not controlling, Judge Froessel maintained, because there the defendant did not have the trial transcript whereas Breslin did have it.

Judges Dye and Fuld dissented in separate opinions. Judge Dye relied primarily on the recent opinions of the Supreme Court in *Griffin* v. *Illinois,* 351 U.S. 12 (1956) (held, violation of due process and equal protection clauses for a state to administer its criminal appeal statute so as to deny adequate appellate review for indigents) and *Johnson* v. *United States,* 352 U.S. 565 (1957) (held, indigent defendant in an *in forma pauperis* application in the federal courts is entitled to both appellate counsel and either the transcript or its equivalent). Judge Dye contended that the assignment of appellate counsel upon request "is fundamental to a sound administration of justice."

In Judge Fuld's view, "concepts of fairness require that [a defendant] have counsel on [his] appeal." *People* v. *Kalan,* he urged, was dispositive of the right of counsel issue raised in the present case. He noted that in *Kalan,* although the Appellate Division had the trial minutes before it, nonetheless the Court of Appeals held it was error to refuse to assign counsel. Judge Fuld further pointed out:

> ". . . effective submission of an appeal requires more than possession by the defendant of a transcript of the minutes of the trial. Any kind of effective presentation demands the aid of a lawyer, and the defendant's poverty * * * should not be permitted to stand in the way of his obtaining an adequate appellate review."

Refusal to assign counsel, Judge Fuld indicated, might be violative of a defendant's rights under the State Constitution.

As a matter of principle, the broad scope of the majority's ruling may be viewed by some as a set-back to the safeguarding of rights of criminal defendants in New York. A system of criminal appeals is not a mandatory part of due process. But once such a system is established, under the doctrine of *Griffin* v. *Illinois*, it must be administered fairly and without discrimination. As Judge Fuld pointed out in his dissent, effective appellate review can be meaningful only if the convicted indigent has the assistance of counsel.

The majority's assertion that there is an "absence of any * * * decisional authority" mandating the assignment of counsel in post-conviction proceedings may not be wholly warranted in the light of *Johnson* v. *United States*. As Judge Dye noted, the Supreme Court there ruled that a criminal defendant seeking to challenge the District Judge's certification that the appeal may not be taken *in forma pauperis* "must" be afforded counsel by the appellate court. Furthermore, the majority's claim that there is an "essential difference" between *Johnson* and the instant case fails to take into account that there were two separate issues raised and decided in *Johnson*, namely the right to the trial transcript or its equivalent and the right to appellate counsel.

The suggestion of the majority that indigents' rights are adequately protected when the record is available to the appellate court could result, as the dissenters noted, in a denial of effective representation to indigents. Under the precepts of our adversary system, the attorney-advocate is responsible for marshalling and presenting arguments on behalf of his client. However, under the majority's reasoning, such responsibility in the case of indigents could, in certain circumstances, be discharged by the appellate court itself.

In practice, this approach might prove inequitable. As Judge Fuld points out, however conscientious an appellate court might be, it is impossible to expect it to examine records "as carefully or as critically as single-minded counsel for the appellant." An indigent defendant, without counsel, would be placed at a distinct disadvantage both as against the State, with its ample legal resources, and as contrasted with defendants with sufficient means to pay for their own counsel.

However, the holding of *People* v. *Kalan* may continue to have vitality and the Court's present ruling accorded limited application. As a practical matter, indigent defendants appealing from judgments of conviction because of their poverty usually would not possess a copy of the transcript of the trial proceedings. Nor would they, because of their imprisonment, be able to examine the transcript filed with the clerk's office pursuant to Section 456 of the Code of Criminal Procedure. Thus, the critical factor present in the instant case—the defendant's possession of the transcript—would be absent in situations where a court seeks, in its discretion, to dispense with the assignment of appellate counsel.

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* This bibliography owes its inspiration and much of its composition to Alex C. Hoagland, Jr., who first became interested in this problem while serving as the Fellow of the Association.

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